Filed 7/12/19 P. v. Barrera CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO ESCOBAR BARRERA et al., Defendants and Appellants.	C085232 (Super. Ct. No. P15CRF0067)

Defendants Roberto Barrera and Raul Gonzalez, along with Nalana Omega, Danielle Weed, and Daisy Garcia, paid a visit to Pete Thomas one night. They took several items of his property and left him with a fatal stab wound to the chest. Garcia later went to the police and revealed part of what happened that night, although she did not witness the actual killing. A jury found defendants Barrera and Gonzalez guilty of

first degree murder (Pen. Code, § 187, subd. (a)) and the trial court sentenced each to 25 years to life in prison.[1]

On appeal, defendants contend the trial court erred when it: (1) refused to permit the defense to call a juror as a witness or to declare a mistrial; (2) admitted evidence of Gonzalez's gang involvement; (3) failed to investigate potential juror misconduct; (4) admitted a recording of a conversation in the transport van; (5) declined to instruct on mistake of fact; and (6) instructed that exculpatory evidence from an accomplice required corroboration. Finally, they contend there was cumulative error. We find no prejudicial error.

In supplemental briefs, defendants contend they are entitled to the ameliorative benefits of Senate Bill No. 1437 (Stats. 2018, ch. 1015), which altered the definitions of malice and first and second degree murder. Senate Bill No. 1437 also established a procedure by which defendants convicted of felony murder, as defendants were here, may petition the trial court to vacate the murder conviction. We find defendants' bid for relief under Senate Bill No. 1437 is limited to this procedure.

We affirm the judgments.

FACTS

Pete Thomas and his brother Byron lived on 26 acres outside of Placerville.[2] Byron and his son lived in a house on the property, while Pete lived in a camp trailer. Both Byron and Pete were retired. Pete used methamphetamine and was addicted to it.

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[1] Omega and Weed were convicted of murder after separate trials. Their convictions are on appeal. (*People v. Omega* (June 21, 2019, C085437) [nonpub. opn.] and *People v. Weed* (May 2, 2019, C085254) [nonpub. opn.].) All three cases were tried on the theory of felony murder.

[2] Because the Thomas brothers share a last name, we refer to them by their first names.

Pete was kind-hearted and helped other people. One of those people who came by and sometimes stayed with Pete was codefendant Weed. The last time Byron saw his brother, Pete was driving off with Weed. Weed had written Pete letters while she was in jail. Byron had a good relationship with Pete but conflict arose over some of Pete's friends who were drug users. Byron would not allow them to stay on the property. Pete and Byron eventually had a falling out over Pete's friends.

Pete owned several guns, including a Glock handgun. He also had a coin collection, jewelry, a laptop computer, and a cell phone. He had a car he lent to others.

On February 3, 2015, one of Pete's friends came to Byron's house and told him something had happened to Pete. The friend had already called 911. Byron went to the trailer and saw Pete on the couch with his eyes open. He knew at once that Pete was dead. Pete had his hand under his shirt clenching another wadded-up shirt in an apparent attempt to apply pressure to a bleeding wound, a small incision on his chest made by a knife with a thin blade. He had bled to death from the stab wound.

Officers searched the trailer and found no knife or other weapons near the body. Pete's computer, cell phone, and the keys to his car were missing. The police collected two drinking glasses and a Styrofoam cup on the table by the couch for DNA analysis.

Alonso Aguilar, a detective with the sheriff's office, knew Daisy Garcia through a family connection. Garcia had a narcotics problem and had reached out to him in the past when she had brushes with the law. On February 8, 2015, she reached out to Aguilar via Facebook to talk to him about a homicide. Aguilar was on vacation in Mexico and unaware of Pete's murder. He called Garcia when he returned and she told him she had information about a murder near Placerville. Aguilar spoke to a supervisor who asked him to arrange a meeting among Aguilar, Garcia, and Detective Netashia Perez.

Garcia had a drug problem (methamphetamine and later heroin) beginning when she was 14 years old. She had been living in a drug flop house. She used methamphetamine every day and sold drugs to support her habit. Garcia had grown up

with Gonzalez and Barrera and considered them close friends. Gonzalez was dating Nalana Omega and they had moved into the flop house.

Omega talked about burglarizing houses to get money for drugs. Omega mentioned an old man; she referred to him as a "chomo," a child molester. A few days before the killing, Garcia went with Gonzalez and Omega as they stole a car. Later, Gonzalez and Omega came by and emptied bags of jewelry and coins on the floor of Garcia's room. Garcia could not stand what was happening and went to Lake Tahoe for a few days where she partied and used drugs.

After she returned to the flop house, on January 31, 2015, Garcia was in her room with Gonzalez, Omega, Barrera, and a man she believed was Gonzalez's uncle; all except Barrera were using methamphetamine. Omega was taking pictures of herself posing with a gun. The group left and dropped off Gonzalez's uncle. Omega talked about picking up a girl who was the only one who knew where the old man lived. Omega had a revolver and Gonzalez had a shotgun. They put the guns in the back of the car. They went to pick up codefendant Weed outside a liquor store.

Weed talked about the old man having "hella stuff" and guns. She mentioned a Glock and said she would point out its location with her eyes. When she said she was going to kill him, Gonzalez said no one was getting killed. Weed described the man's property so they could steal it.

Before they reached Pete's, they stopped and Gonzalez got the guns from the back of the car. At Pete's, Barrera stayed in the car and Gonzalez handed him the shotgun and told him to keep guard. The others went inside and used drugs with Pete. Gonzalez wanted to buy methamphetamine and Pete called someone to arrange a sale. Garcia drank some iced tea.

Weed walked around the trailer looking for jewelry and putting it in her pockets. The conversation turned to the Glock. Pete did not want to take it out or sell it, but when Garcia returned from the restroom he had it out. Gonzalez asked Garcia to get Barrera. She went to the car and told Barrera that Gonzalez wanted him. She stayed in the car.

Weed made trips to the car with Pete's laptop computer, a jewelry box, a box of quarters, and a gun or two. Later, Weed, Gonzalez, Omega, and Barrera ran to the car. Weed had a glove on and was holding a knife. Omega took the knife and wrapped it in a sweater. Gonzalez said, "What did that crazy bitch do?" "Why the fuck did you do that?" They left Pete's house and stopped at a house where Omega took the sweater inside and returned without it. Gonzalez told Garcia that Weed had stabbed the man. A few days later, Weed admitted to Garcia that she had stabbed Pete.

The People offered a variety of evidence to corroborate Garcia's testimony. Jeremy Gannon was a former drug dealer who had sold drugs to Pete. On January 31, 2015, Pete called him asked the price for half an ounce of methamphetamine; it was not just for himself. Gannon agreed to meet him at Bucks Bar for the purchase; he waited hours but Pete never showed up. Gannon called Pete that night and the next day, but there was no answer. Cell phone records confirmed these calls.

Charles Hernandez testified about the flop house he owned. Garcia had lived there for six months before the killing. Omega and Gonzalez harassed her and tried to muscle their way into her room. Barrera was a regular visitor. Hernandez observed the group bringing in "stuff" in duffle bags.

Efren Zamora, Gonzalez's godfather, testified he was with the group that night. He claimed he did not see any guns. He had told a detective he had a bad feeling about what they were going to do and had them drop him off before they went elsewhere.

The police conducted a number of searches and found a variety of property consistent with burglaries. A search of a Honda registered to Gonzalez revealed ammunition, pocket knives, jewelry, challenge coins, and a check made out to Paul

Sweeney. A search of Barrera's residence disclosed honey oil, marijuana, ammunition, and a gun. During a traffic stop of Gonzalez, Omega, and two others, the police found a Glock handgun in Omega's purse. A backpack in the car contained a revolver, checks, ammunition, and jewelry. There was a shotgun in the attic of the flop house. A trunk contained several bags of jewelry. Garcia helped Detective Perez find the car driven the night of the killing, a silver two-door Hyundai registered to Efren Zamora.

DNA analysis revealed a profile matching Pete's on one of the glasses taken from the trailer. A second glass had four contributors and no further analysis could be made. Weed's DNA profile was consistent with a major contributor to the DNA on the Styrofoam cup and Omega could not be excluded as a minor contributor.

An investigator from the district attorney's office reviewed calls that Omega made from jail. Omega called a number associated with Gonzalez 23 times. According to the investigator, the calls were to a man with whom Omega was involved romantically and the theme of the calls was getting her out on bail. Omega told the man she had taken the gun case for him so he would not have to go to jail.

A recording device captured a conversation among Weed, Omega, Gonzalez, and Barrera as they were being transported in a van to the courthouse. The contents of this tape recording are discussed more fully *post*. Omega was recorded saying, "Hey, we went there for a sack period. Just stick with that." Barrera claimed he was not there, but Gonzalez contradicted him and Omega said they all were there and that the prosecution had their DNA and multiple statements to that effect.

Gonzalez testified in his defense. His version of events that night was similar to Garcia's, except he denied there were any guns or any discussion of a burglary or theft. Gonzalez claimed they went to Pete's solely to buy drugs.[3] He did not see Weed make trips to the car with Pete's property. When he, Omega, and Barrera left Pete's, Weed stayed behind. Gonzalez saw Pete by the door when Weed left the trailer. He heard Weed say she cut Pete. Gonzalez admitted he had lied extensively when first interviewed.

DISCUSSION

I

Refusal to Allow the Defense to Call a Juror as a Witness or Declare a Mistrial

Defendants contend the trial court erred in not allowing the defense to call a sitting juror as a witness and then not declaring a mistrial as provided for in Evidence Code section 704, subdivision (b).[4] They further contend they were denied effective assistance of counsel because counsel failed to bring section 704 to the trial court's attention.

A. *Background*

At the end of court one day while she was on the stand, Garcia told an investigator one of the jurors knew at least one of the defendants. She recognized him from somewhere although she was not sure where, but she was 100 percent certain she had seen him with the defendants. The investigator told the court he was walking Garcia to his car when she said it did not matter, they were going to get off anyway. She said Juror No. 2 knew them; he was either a friend or family. She was 100 percent sure.

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[3] This appears to be the same explanation as Omega's use of the slang term "went for a sack." Gonzalez confirmed to the prosecutor on cross examination that the truth was defendants only went to Pete's the evening of the murder to buy a "sack of dope."

[4] Undesignated statutory references are to the Evidence Code.

After some discussion, the defense expressed concern that singling Juror No. 2 out for questioning might affect his impartiality. Counsel suggested excusing him and the court asked how since the juror had done nothing wrong. The defense indicated they would want to call him as a witness to attack Garcia's credibility. Garcia claimed she was 100 percent certain the juror knew defendants and the juror would take the stand and say otherwise. The court responded the juror could not be a witness.

The prosecutor argued there was no relevance to the juror's testimony and the defense responded he was relevant to Garcia's credibility. The prosecutor claimed the defense was getting into collateral cross-examination. The defense wanted to use Garcia's presumably false claim that Juror No. 2 knew defendants as an example of Garcia creating facts out of thin air. After further discussion, it was agreed that the court would question the entire jury to ask if any juror recognized anyone in the courtroom. There was no affirmative response from any juror.

B. *Analysis*

Section 704 addresses the calling of a juror as a witness:

"(a) Before a juror sworn and impaneled in the trial of an action may be called to testify before the jury in that trial as a witness, he shall, in proceedings conducted by the court out of the presence and hearing of the remaining jurors, inform the parties of the information he has concerning any fact or matter about which he will be called to testify.

"(b) Against the objection of a party, a juror sworn and impaneled in the trial of an action may not testify before the jury in that trial as a witness. Upon such objection, the court shall declare a mistrial and order the action assigned for trial before another jury.

"(c) The calling of a juror to testify before the jury as a witness shall be deemed a consent to the granting of a motion for mistrial, and an objection to such calling of a juror shall be deemed a motion for mistrial.

"(d) In the absence of objection by a party, a juror sworn and impaneled in the trial of an action may be compelled to testify in that trial as a witness."

Defendants contend that because the People objected to calling Juror No. 2 as a witness, the court was required under subdivision (b) of section 704 to declare a mistrial. However, that contention is not accurate. Under the statutory scheme, the nature and admissibility of the juror's testimony must first be established. (§ 704, subd. (a).) If a criminal defendant could trigger the mistrial provisions of the statute without first establishing that the juror's testimony was admissible, a defendant could automatically obtain a mistrial simply by proposing, without any basis, to call a juror as a witness, knowing the People would properly object. That is not--and cannot be--the law.

The People contend the trial court properly excluded Juror No. 2's testimony under section 352, finding its minimal relevance was substantially outweighed by the potential for prejudice and confusion. Defendants argue that the trial court did not exclude the testimony of Juror No. 2 under section 352 but under the mistaken belief that a sitting juror could not be a witness in the same case. We observe that the prosecutor did raise section 352 as a basis to exclude the proposed testimony, arguing it was impeachment on a collateral matter. He argued Garcia may have been mistaken rather than lying, and if Juror No. 2 denied knowing the defendants here, as the parties assumed he would, resolution would require a mini-trial on who was telling the truth, Garcia or Juror No. 2.

Thus, the issue of section 352 was squarely before the trial court. Even assuming the court based its ruling on an erroneous assumption that jurors could not be witnesses, we review the court's decision, not its rationale. "A 'ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion. [¶] . . . [¶] In other words, it is judicial action, and not judicial reasoning or argument, which is the subject of review; and, if the former be correct, we are not concerned with the faults of the latter.' [Citation.]" (*People v. Dawkins* (2014) 230 Cal.App.4th 991, 1004.)

The defense wanted to call Juror No. 2 as a witness to impeach Garcia's credibility, but the issue of whether she correctly identified Juror No. 2 as known to defendants was clearly a collateral matter. "A court has substantial discretion under Evidence Code section 352 to exclude evidence on collateral issues." (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1248.) While the issue of Garcia's credibility was the key issue at trial, there was already abundant evidence raising concerns about her memory and inconsistent statements. Both defense counsel cross-examined her at length about inconsistencies between her trial testimony and her testimony at the preliminary hearing about the events the night of the killing, such as who had guns, her drug use that night, whether Gonzalez told Barrera to stand guard, and other details. Counsel also questioned Garcia about her statements to detective Perez that her mind had blocked out certain memories from that night and that she saw Omega throw the knife Weed used out of the car window. It was undisputed that Garcia had a significant drug problem. In the days before the killing she was using methamphetamine every day and she had partied and used drugs in Lake Tahoe for two days immediately before the killing.

There was other evidence before the jury also undercutting Garcia's credibility. At the time of trial, she was in custody on a violation of probation stemming from petty theft and possession of heroin. She admitted she had sold drugs and had helped Omega and Gonzalez steal a car. She had used child support money to buy drugs, and had prior convictions for auto theft and elder abuse. She acknowledged she did not recall much of what happened that night of the killing.

Thus, Garcia's alleged statement that she was certain Juror No. 2 knew defendants, even if proven false in a mini-trial, was of limited probative value and was highly cumulative. The limited probative value in no way justified the consumption of time hearing the testimony of the juror and Garcia, not to mention additional testimony from other witnesses called to corroborate or impeach the anticipated conflicting testimony. The trial court did not abuse its discretion in refusing to permit the defense to

call Juror No. 2 as a witness. "The trial court has broad discretion to exclude impeachment evidence under Evidence Code section 352. [Citation.] Although wide latitude should be given to cross-examination designed to test the credibility of a prosecution witness, '[t]he statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' [Citation.]" (*People v. Hamilton* (2009) 45 Cal.4th 863, 946.)

Defendants contend the court's ruling deprived them of due process, confrontation rights, and a fair trial. Limitations on cross-examination or impeachment violate these federal constitutional rights only where "a reasonable jury might have received a significantly different impression of the witness's credibility." (*People v. Quartermain* (1997) 16 Cal.4th 600, 624.) As we have already discussed at length, that was not the case here. Defendants argue that Garcia was unworthy of belief due to her drug use, inconsistent statements, and motive to assist the prosecution, but fail to explain how one more example of an incorrect statement would have changed the jury's perception, particularly given the abundant evidence corroborating her testimony.

Because we find no error in the exclusion of Juror No. 2's testimony, defendants' claim of ineffective assistance also fails. "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.) As the juror's testimony was properly disallowed, citing to section 704 would not have resulted in a more favorable outcome for defendants.

II

Admission of Gonzalez's Gang Involvement

Defendants contend it was prejudicial error to admit evidence of Gonzalez's prior involvement with gangs. The People concede the error but argue the admission of this evidence was harmless because its mention was brief, it was outdated information and explained by Gonzalez, and it was never mentioned by the prosecution.

A. *Background*

Gonzalez moved in limine to exclude any evidence of his alleged gang affiliation in the past. The People indicated they did not plan to admit such evidence in their case-in-chief, but it would potentially be relevant if Gonzalez choose to testify. The defense argued the evidence should be excluded under section 352. The trial court granted Gonzalez's motion to exclude but indicated it would revisit the issue should it become relevant.

Before Gonzalez testified, the parties discussed what evidence could be used to impeach him. Counsel specifically asked about questioning Gonzalez about his gang membership years ago. The defense argued it was not relevant because there was no evidence this crime was gang related. The prosecutor argued it was relevant to Gonzalez's repeated burglaries. The trial court ruled the gang evidence admissible.

Gonzalez was 22 years old at the time of the crime and 25 at trial. When he took the stand, his counsel elicited on direct that he had two misdemeanor convictions and had been involved with the Sureño gang when he was 13, 14, and 15 years old. He ceased involvement at 15 when he found out his girlfriend was pregnant. The prosecutor did not cross examine on this issue, and the only other mention of Gonzalez's gang involvement was a brief mention of it by his counsel in closing argument.

B. *Analysis*

"In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is

minimal." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) "Gang evidence should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) Here, evidence of Gonzalez's prior gang involvement was not relevant to prove "identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Hernandez,* at p. 1049.) We agree with the parties that it was error to admit the gang evidence.

Defendants argue that if the gang evidence had been excluded, the jury may have resolved the credibility contest between Garcia and Gonzalez in favor of the defense. They argue admitting this evidence violated their federal constitutional rights and was state evidentiary error.

"California courts have long recognized the potentially prejudicial effect of gang membership." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) In *Albarran*, the gang evidence included gang graffiti of threats to kill police officers, defendant's tattoo showing allegiance to the violent prison gang the Mexican Mafia, and descriptions of other gang members and their crimes. (*Id*. at pp. 220-221.) During closing argument, the prosecutor made a number of references to Albarran's gang involvement, including that it made his alibi unbelievable. (*Id*. at p. 222.) The appellate court found the admission of the gang evidence was constitutional error. "This case presents one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair. Given the nature and amount of this gang evidence at issue, the number of witnesses who testified to Albarran's gang affiliations and the role the gang evidence played in the prosecutor's argument, we are not convinced beyond a reasonable doubt that the error did not contribute to the verdict." (*Id.* at p. 232.)

We find *Albarran* distinguishable. Here, the references to Gonzalez's limited past gang involvement was brief and minimal and did not render the trial fundamentally unfair. The evidence was that Gonzalez had been involved with a gang in the past when he was a young teenager; there was no evidence of continued involvement or association, and he testified he left the gang when he learned he was going to be a father. There was no evidence about gangs in general and no inflammatory evidence of gang crimes. The prosecutor made no mention of Gonzalez's gang involvement in closing argument and did not rely on it to attack Gonzalez's credibility or in any other way.

Nor do we find prejudicial state evidentiary error. It is not likely the jury was influenced by the gang evidence in accepting Garcia's account of the events of January 31, 2015. The key issue was whether the group went to Pete's to steal his property. Garcia's testimony that the plan was theft or robbery was corroborated by evidence defendants and Omega had stolen other property. Gonzalez's testimony to the contrary was undercut by his many lies to the police. Absent the gang evidence, it is not reasonably probable that a result more favorable to defendants would have been reached. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

III

Failure to Investigate Potential Juror Misconduct

Defendants contend it was reversible error not to conduct an inquiry into possible juror misconduct. Defendants contend the trial court should have inquired whether Juror No. 2, who was a prison counselor, could set aside his specialized knowledge in deciding this case.

A. *Background*

After the recording of the conversation in the transport van was played to the jury, Juror No. 2 told the bailiff that he had heard "a moniker" that was not in the transcript. With the agreement of the parties, the court instructed the jurors that the audio was the actual evidence, not the transcript.

After the trial court ruled evidence of Gonzalez's gang involvement was admissible, defense counsel raised the concern that Juror No. 2 would use his special knowledge about gangs while the jury was deliberating. Counsel raised Juror No. 2's comment that he heard "a moniker" on the recording and asked the court to inquire if the juror thought he heard something gang related, arguing there was the potential for jury contamination.

The court indicated it would be improper to question a juror about his interpretation of the evidence. The court noted that all three counsel chose to leave Juror No. 2 on the jury knowing his job and job description. The court declared that unless the juror committed misconduct, became ill, or otherwise could not act as a juror, there was no basis for any inquiry.

B. *Analysis*

Juror No. 2 had 15 years of experience in the prison system, first as a correctional officer and now as a correctional counselor, a captain's level position. His wife, brother, and uncle were correctional officers. Because apparently he was the only one who heard the "moniker" on the tape, defendants contend the reasonable inference is that he formed an opinion as to what was said on the tape based on his specialized knowledge obtained while working in prisons. They argue that if he related that opinion to other jurors, it would be misconduct.

"When a trial court is aware of possible juror misconduct, the court 'must "make whatever inquiry is reasonably necessary" ' to resolve the matter. [Citation.] It must do so, however, only when the defense comes forward with evidence that demonstrates a 'strong possibility' of prejudicial misconduct. [Citation.]" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1255.) "When a court is informed of allegations which, if proven true, would constitute good cause for a juror's removal, a hearing is *required*." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1051.)

"It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*In re Malone* (1996) 12 Cal.4th 935, 963.)

Defendants failed in the trial court to make a showing of possible juror misconduct required to trigger a mandatory inquiry, and thus the trial court was not required to hold a hearing. Merely because a juror may have heard a word on a correctly admitted piece of evidence is not reason to query the juror. Jurors are permitted to closely examine the evidence; in fact, they are expected to do so. Defendants' assertion that Juror No. 2 necessarily relied on specialized knowledge obtained from his work in the prison system to decipher the "moniker" heard on the tape is pure speculation, even if we assume Juror No. 2's use of the term "moniker" refers to a gang term. (See *People v. Fernandez* (2012) 208 Cal.App.4th 100, 107 ["moniker" is nickname given to gang member].) The trial court listened again to the tape and determined there were two possibilities for the term Juror No. 2 heard. One was Omega saying, "They set us up, they set us up." The court thought she may have said, "They set us up, Homes." The court did not articulate specifics of the second possibility it heard.

"The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial." (*People v. Ray* (1996) 13 Cal.4th 313, 343.) That Juror No. 2 heard something the others could not make out does not indicate he used any specialized knowledge; he might simply have more acute hearing. Nor does the fact that he ascribed gang undertones to what he heard indicate an improper use of specialized knowledge. While correctional officers probably have

greater knowledge of and familiarity with gang terms than the ordinary juror, such knowledge is no longer particularly specialized given the prevalence of what was once exclusively gang terminology in popular culture. Over two decades ago, it was noted: "In newspapers, on television, and in rap music, gang culture has merged into popular culture." (Christo Lassiter, *The Stop and Frisk of Criminal Street Gang Members* (1995) 14 Nat'l Black L.J. 1, 58, fn. 13.)

Defendants provided no information to raise any suspicion that Juror No. 2 would act inappropriately during deliberations. Rather, the fact that he disclosed that he heard something on the tape that was not in the transcript indicates he approached his job as a juror conscientiously. During voir dire, Juror No. 2 affirmed that he would decide the case solely on the facts and evidence presented. He stated that nothing in his background as a correctional officer would make it difficult for him to be fair. At the beginning of the trial, the court instructed the jurors their verdict "must be based only on the evidence presented during the trial and the law as I provide it to you." Defendants offer nothing to suggest that Juror No. 2 did not follow this instruction.

IV

Admission of Recorded Conversation in the Van

Defendants contend the trial court abused its discretion in admitting the recorded conversation in the transport van. They contend the recording should have been excluded under section 352 because its probative value was substantially outweighed by the danger of prejudice and confusion. In particular, they contend a remark by Omega was ambiguous and they were unable to cross-examine her as to its meaning.

A. *Background*

Prior to trial, Barrera moved to sever his case from those of Gonzalez, Weed, and Omega or to exclude their extrajudicial statements. Gonzalez moved to sever his and Barrera's case from those of Weed and Omega or to exclude their extrajudicial

statements. The court granted the severance motion and counsel stipulated to individual trials for Weed and Omega and a joint trial for Gonzalez and Barrera.

The People moved to admit statements made when the four defendants were being transported to court in a van. During that conversation Omega said they were "just there for a sack," meaning at Pete's trailer to secure drugs. Barrera responded he was not there, but Gonzalez called him a fool and said they had them there and that Barrera had "drank the lemonade." Omega said there were two statements that they were all there plus DNA and fingerprints. Barrera stayed silent. The People contended the statements were admissible against Omega and Gonzalez as admissions of a party and against Barrera as adoptive admissions.

The trial court found it was "classic adoptive admission under Evidence Code section 1221." It granted the People's motion to admit the evidence and would instruct the jury with CALCRIM No. 357.

At a later proceeding, the defense argued the recorded conversation should be excluded under section 352. Although the basis for admitting it as an adoptive admission by Barrera was to show he was at Pete's trailer, that fact was not disputed. There was potential prejudice because there was no opportunity to question Omega about what she said and what she meant. The People argued the conversation proved a conspiracy, starting with Omega's statement to stick to the story that we were just there to buy a sack. The court noted Omega's statement about buying a sack and "just stick to that" "has a lot more connotation than we were just there to buy a sack." The court affirmed its prior ruling.

An edited version of the tape was played to the jury. The relevant portion of the tape is as follows:

"Nalana Omega: Hey--we just went there for a sack period. Just stick with that.

"Raul Gonzalez: I know.

"Nalana Omega: And I don't want to talk no more.

"Raul Gonzalez: I know.

"Nalana Omega: And my lawyer is taking care of it. Like, he told me (inaudible) my favor.

"Roberto Barrera: [in Spanish] I wasn't there.

"Raul Gonzalez: (Inaudible) I know, I'm just saying they do have you there. You can say what you want to fool, but [in Spanish] don't you remember that you drank the lemonade . . . you drank."

Omega goes on to say they have DNA from the cups, statements from Garcia, and fingerprints.

B. *Analysis*

Defendants' argument focuses on Omega's statement, "Hey--we just went there for a sack period. Just stick with that." They contend the statement is ambiguous. Omega could have been simply stating the truth (and defendants' defense) that they went to Pete's solely to buy drugs, or she could have been suggesting a concocted story to avoid culpability. Defendants contend this ambiguity may have confused the jury and because they had no opportunity to question Omega about her meaning, the jury may have punished them for guilt by association.

This argument is unavailing. Defendants appear not to understand the nature of an adoptive admission and they do not contest the admissibility of Omega's statement as such. This case is similar to *People v. Jennings* (2010) 50 Cal.4th 616, where the defendant challenged the admission of statements made during a joint interview as violating his right of confrontation under *Crawford v. Washington* (2004) 541 U.S. 36, *Bruton v. United States* (1968) 391 U.S. 123, and *People v. Aranda* (1965) 63 Cal.2d 518.

In rejecting this argument, our Supreme Court stated: " 'Moreover, it is well settled that an adoptive admission can be admitted into evidence without violating the Sixth Amendment right to confrontation "on the ground that 'once the defendant has expressly or impliedly adopted the statements of another, the statements become *his own*

admissions, and are admissible on that basis as a well-recognized exception to the hearsay rule.' " [Citation.]' [Citation.] 'Being deemed the defendant's own admissions, we are no longer concerned with the veracity or credibility of the original declarant. Accordingly, no confrontation right is impinged when those statements are admitted as adoptive admissions without providing for cross-examination of the declarant.' [Citation.] Stated another way, when a defendant has adopted a statement as his own, 'the defendant himself is, in effect, the declarant. The "witness" against the defendant is the defendant himself, not the actual declarant; there is no violation of the defendant's right to confront the declarant because the defendant only has the right to confront "the witnesses against him." [Citations.]' [Citation.]" (*People v. Jennings, supra,* 50 Cal.4th at pp. 661-662.)

Both defendants adopted Omega's statement about sticking to the story that they were only seeking drugs from Pete, either by saying "I know" (Gonzalez) or remaining silent (Barrera); the law treats their adoption as if each defendant themselves made the admission. Any ambiguity in this evidence was an issue for the jury to resolve. (*People v. Midkiff* (1968) 262 Cal.App.2d 734, 740.) Of course, defendants could aid the jury in resolving any ambiguity by explaining what the statement meant in their view either through testimony or argument of counsel. But the fact that the statement could be interpreted in different ways was not grounds to exclude it.

V

Failure to Instruct on Mistake of Fact

Defendants contend the trial court erred in failing to instruct the jury on mistake of fact. (CALCRIM No. 3406.) They assert there was evidence to support the instruction because they did not believe they were going to Pete's to rob him; they intended only to buy drugs. They contend they were mistaken as to the reason for going to Pete's that night.

During the conference on jury instructions, the defense requested CALCRIM No. 3406, explaining that defendants were under the mistaken belief they were going to Pete's trailer to purchase methamphetamine. The trial court responded that theory was covered in the instructions for robbery and burglary, interpreting the defense argument to mean that defendants did not have the necessary intent for the charged crimes. The prosecutor added that defense counsel was confusing mistake of fact with defendants' mental state. He argued the "real defense" was that defendants did not form the intent to commit burglary or robbery, it was not about mistaken facts. The parties then discussed a need to modify the instruction, but the court declined to give the instruction at all because "it just becomes too cumbersome for one thing." The court found the defense theory was adequately covered by the instructions on specific intent, burglary or robbery.

The classes of persons who are incapable of committing crimes include those "who committed the act . . . charged under an ignorance or mistake of fact, which disproves any criminal intent." (Pen. Code, § 26, class Three.) "[T]he particular 'defense' of mistake of fact requires, at a minimum, an actual belief 'in the existence of circumstances, which, if true, would make the act with which the person is charged an innocent act.' [Citations.]" (*People v. Lawson* (2013) 215 Cal.App.4th 108, 115.) "For general intent crimes, the defendant's mistaken belief must be both actual and reasonable, but if the mental state of the crime is a specific intent or knowledge, then the mistaken belief must only be actual." (*Ibid.*)

Defendants' alleged mistake of fact was that they believed they were going to Pete's only to buy drugs; in other words, they were mistaken about the evening's goal. But the jury was adequately instructed that Gonzalez and Barrera had to have a specific intent to commit, aid and abet, or conspire to commit murder, robbery, or theft to be guilty. The instructions told the jury a defendant could be guilty of aiding and abetting only if he "intended to aid and abet the perpetrator in committing the crime." To prove defendant was a member of a conspiracy, the People had to prove "defendant intended to

agree and did agree with one or more of the other defendants or coparticipants to commit Robbery or Burglary." To prove guilt under the theory of felony murder, the People had to prove "defendant intended to commit, or intended to aid and abet the perpetrator in committing, or intended that one or more of the members of the conspiracy commit robbery or burglary."

Whether Weed and Omega had a different intent is irrelevant. As the instructions made clear, only defendants' intent was at issue. There was no evidence to support a mistake of fact instruction.

VI

Instructing that Exculpatory Evidence from an Accomplice Requires Corroboration

Defendants contend the instructions erroneously and prejudicially told the jury that the exculpatory portions of Garcia's testimony required corroboration.

A. *Background*

The trial court instructed the jury pursuant to CALCRIM No. 334, that if it found Garcia was an accomplice, it could rely on her testimony to convict defendants only if her testimony was supported by other evidence that connected defendants to the crime. The court also instructed in the language of CALCRIM No. 301, as then constituted: "Except for the testimony of Daisy Garcia, which requires supporting evidence if you decide she is an accomplice, the testimony of only one witness can prove a fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all of the evidence."[5]

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[5] CALCRIM No. 301 was revised in September 2017. It now reads: "[Unless I instruct you otherwise,] (T/the) testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all evidence."

While Garcia provided evidence that the group intended to steal from Pete that night, she also gave evidence that was favorable to defendants. For example, she had told law enforcement that Gonzalez and Barrera had "nothing to do with it." She thought they were going only to party, smoke dope, and maybe buy drugs. She never heard Barrera discussing robbing anyone. There was no such discussion in the car before they picked up Weed. Gonzalez objected when Weed said she was going to kill someone. Pete did not object when Weed pocketed his property.

B. *Analysis*

Penal Code section 1111 places a restriction on the use of accomplice testimony to *convict* a defendant. "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense . . . ." (*Id*., § 1111.) The reason for this rule is that "an accomplice has a natural incentive to minimize his own guilt before the jury and to enlarge that of his cohorts." (*People v. Brown* (2003) 31 Cal.4th 518, 555.) That concern is not present when the accomplice's testimony favors defendant. "Because an accomplice does not ordinarily stand to benefit from providing testimony on behalf of the defendant, his or her statements are not necessarily suspect." (*People v. Guiuan* (1998) 18 Cal.4th 558, 567.) Therefore, the instruction on accomplice testimony applies only to accomplice testimony that tends to incriminate the defendant. (*Id.* at p. 569.)

Defendants contend the two instructions given as recited above and taken together, told the jury that Garcia's entire testimony, exculpatory as well as incriminating, required corroboration if the jury found she was an accomplice. Defendants rely on *People v. Smith* (2017) 12 Cal.App.5th 766. In *Smith*, the trial court gave instructions similar to those here and the appellate court found the instruction requiring supporting evidence for the testimony of an accomplice was error because it required corroboration even for the accomplice's exculpatory evidence. (*Id*. at p. 780.) The court found the error prejudicial because the need for corroboration of the accomplice's testimony became a point of

disagreement and the hold-out juror was dismissed in part because other jurors believed this juror was unwilling to follow the court's instruction on the need for corroboration. (*Id.* at p. 781.)

The People contend the instructions, taken as a whole, informed the jury that corroboration of an accomplice's testimony was necessary only to use that testimony to convict defendant. " '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' " (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) Further, the People argue any error was harmless because the exculpatory portions of Garcia's testimony were corroborated by the testimony of Gonzalez and a defense witness who testified that Garcia told him Gonzalez and Barrera had nothing to do with the crime; they just went to buy dope.

Defendants do not dispute that there is evidence corroborating Garcia's exculpatory testimony. Rather, they contend the jury would not have found such evidence to be "supporting evidence" because the instruction on the use of accomplice testimony told the jury "supporting evidence must tend to connect the defendant to the commission of the crime." The evidence supporting Garcia's exculpatory testimony naturally did not tend to connect defendants to the crime.

We reject this argument. "Jurors are presumed to be intelligent persons capable of understanding and correlating jury instructions. [Citation.] An erroneous instruction requires reversal only when it appears that the error was likely to have misled the jury. [Citations.]" (*People v. Brock* (2006) 143 Cal.App.4th 1266, 1277.) Had the jurors believed that CALCRIM No. 301 required supporting evidence for Garcia's exculpatory evidence, they would have understood that under CALCRIM No. 334 supporting evidence must tend to connect defendants to the crime only if such evidence is used to convict defendant. This is not a case like *Smith* where there is evidence of juror

confusion over the corroboration requirement. Any error in instructing the jury as to the corroboration requirement for Garcia's testimony was harmless.

VII

Cumulative Error

Defendants contend the multiple errors were cumulatively prejudicial. We have rejected most of defendants' claims of error. We have found error only in the admission of the gang evidence and possibly instructional error as to the accomplice corroboration requirement.

"A claim of cumulative error is in essence a due process claim and is often presented as such [citation]. 'The "litmus test" for cumulative error "is whether defendant received due process and a fair trial." ' [Citation.]" (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1436.) We are satisfied this trial was fair beyond any doubt, although error did occur.

VIII

Senate Bill No. 1437

In supplemental briefs, defendants contend their convictions must be reversed because they are entitled to the ameliorative benefits of Senate Bill No. 1437 which became effective January 1, 2019. Senate Bill No. 1437 amended the felony murder rule "to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).)

The bill amended Penal Code section 189 to provide that a participant in the perpetration or attempted perpetration of certain felonies, including robbery or burglary, "in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶]

(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (Pen. Code, § 189, subd. (e); as amended by Stats. 2018, ch. 1015, § 3.)

Senate Bill No. 1437 also added a procedure for persons convicted of felony murder to petition the sentencing court to have the murder conviction vacated and to be resentenced. New Penal Code section 1170.95 places three conditions on such a petition. "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (*Id.*, § 1170.95, subd. (a); added by Stats. 2018, ch. 1015, § 4.)

The sentencing court reviews the petition to determine if petitioner has made a prima facie showing for relief and appoints counsel if petitioner so requests. If petitioner makes a prima facie showing, the court issues an order to show cause. (Pen. Code, § 1170.95, subd. (c).) The court then holds a hearing to determine if petitioner is entitled to relief. The burden of proof is on the prosecution to prove beyond a reasonable doubt that petitioner is ineligible for resentencing. (*Id.*, subd. (d).) "If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes." (*Id.*, subd. (e).)

Defendants contend that since their convictions were not final when Senate Bill No. 1437 became effective, it applies retroactively to them under the rule of *In re Estrada* (1965) 63 Cal.2d 740: "[W]here the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the

lighter punishment is imposed." (*Id.* at p. 748.) They contend retroactive application of Senate Bill No. 1437 means that the trial court misinstructed on the elements of felony murder. They assert this error was prejudicial because there was evidence from which the jury could find each defendant was not a major participant nor acted with reckless disregard of human life. They contend their murder convictions must be reversed.

In *People v. Martinez* (2019) 31 Cal.App.5th 719 (*Martinez*), Division 5 of the Second District recently considered how Senate Bill No. 1437 applies to a defendant convicted of felony murder whose conviction was not final when Senate Bill No. 1437 became effective. The court concluded that such a defendant "must file a [Pen. Code] section 1170.95 petition in the trial court to seek retroactive relief under Senate Bill 1437." (*Martinez,* at p. 729.)

The *Martinez* court relied upon two California Supreme Court cases it found addressed analogous circumstances. (*Martinez, supra,* 31 Cal.App.5th at p. 725.) In *People v. Conley* (2016) 63 Cal.4th 646 (*Conley*), defendant had been sentenced under the three strikes law to an indeterminate term of 25 years to life and appealed. While his appeal was pending, voters passed the Three Strikes Reform Act of 2012 (Proposition 36); two days later the appellate court issued its decision. Defendant petitioned for rehearing asking the court to remand to the trial court for resentencing. (*Conley,* at pp. 654-655.) Defendant argued that since his judgment was not yet final, he was entitled to rely on the rule of *Estrada* and to be automatically resentenced without complying with the provisions of Proposition 36 (§ 1170.126, subd. (b)) that required filing a petition and the trial court's determination of his risk to public safety. (*Conley,* at pp. 655-656.)

Our Supreme Court rejected defendant's argument. It held the post-conviction procedure of section 1170.126 was the exclusive means of relief for three reasons. First, unlike the statute at issue in *Estrada,* Proposition 36 was not silent on the issue of retroactivity, but directly addressed the issue in section 1170.126. (*Conley, supra,* 63 Cal.4th at p. 657.*)* Second, resentencing under Proposition 36 was contingent on the

court's evaluation of defendant's dangerousness and an automatic resentencing would eliminate that requirement. (*Id.* at pp. 658-659.) Third, Proposition 36 established a set of disqualifying factors that the prosecution had to plead and prove. Proposition 36 "does not address the complexities involved in applying the pleading-and-proof requirements to previously sentenced defendants precisely because the electorate did not contemplate that these provisions would apply. Rather, voters intended for previously sentenced defendants to seek relief under section 1170.126, which contains no comparable pleading-and-proof requirements." (*Id.* at pp. 660-661.)

In *People v. DeHoyos* (2018) 4 Cal.5th 594, the court reached a similar result as to the retroactivity of Proposition 47 (The Safe Neighborhoods and Schools Act) to nonfinal cases on direct appeal. "Proposition 47 redefined several common theft- and drug-related felonies as either misdemeanors or felonies, depending on the offender's criminal history" and provided a procedure for petitioning for resentencing similar to that of Proposition 36, including a determination of defendant's risk of dangerousness. (*Id.* at pp. 597, 598-599.) Like Proposition 36, Proposition 47 was not silent on the issue of retroactivity, but contained detailed provisions that drew no distinction between those serving final or nonfinal sentences and resentencing was dependent on the court's assessment of defendant's risk of dangerousness. (*Id.* at p. 603.) While Proposition 47 did not create new sentencing factors, other indicia of legislative intent showed the resentencing scheme provided was the exclusive remedy. (*Ibid.*)

The *Martinez* court found that the "analytical framework animating decisions in *Conley* and *DeHoyos* is equally applicable here. Like Propositions 36 and 47, Senate Bill 1437 is not silent on the question of retroactivity. Rather, it provides the retroactivity rules in [Pen. Code] section 1170.95. . . . That the Legislature specifically created this mechanism, which facially applies to both final and nonfinal convictions, is a significant indication Senate Bill 1437 should not be applied retroactively to nonfinal convictions on direct appeal." (*Martinez, supra,* 31 Cal.App.5th at p. 727.)

Defendants contend *Conley* and *DeHoyos* are distinguishable because the new laws in those cases required the trial court to make a finding as to defendant's risk of danger to the public safety and no such finding is required under Senate Bill No. 1437. The *Martinez* court rejected this argument. "While defendant is correct that [Pen. Code] section 1170.95 does not require a dangerousness inquiry, neither *Conley* nor *DeHoyos* holds that inquiry was the indispensable statutory feature on which the result in those cases turned. To the contrary, *Conley* notes '[o]ur cases do not "dictate to legislative drafters the forms in which laws must be written" to express an intent to modify or limit the retroactive effect of an ameliorative change; rather, they require "that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it." ' " (*Martinez, supra,* 31 Cal.App.5th at p. 728.)

The *Martinez* court found the provision of a detailed mechanism for resentencing in Penal Code section 1170.95 was sufficient legislative intent that such mechanism was the exclusive means of seeking relief under Senate Bill No. 1437. We find its reasoning persuasive and follow it.

Defendants contend that such result leaves them without a remedy until their appeals are final. They argue this result is anomalous because defendants pending trial or whose judgments are final have an immediate remedy. The *Martinez* court noted that a defendant who believes he has a particularly strong case for relief could move to stay his pending appeal to seek immediate relief in the trial court. (*Martinez, supra,* 31 Cal.App.5th at p. 729.) We express no opinion as to whether such immediate relief is appropriate for either defendant in this case.

DISPOSITION

The judgments are affirmed.

/s/
Duarte, J.

We concur:

/s/
Raye, P. J.

/s/
Robie, J.